

NO. SC 85292

RIVERSIDE-QUINDARO BEND LEVEE DISTRICT,  
PLATTE COUNTY, MISSOURI,

Respondent,

vs.

INTERCONTINENTAL ENGINEERING MANUFACTURING CORPORATION,  
ESTATE OF ED YOUNG, WESLEY SEYLLER AND CAROL SEYLLER,  
KITTERMAN, INC., PROLOGIS TRUST AND  
SECURITY CAPITAL INDUSTRIAL TRUST,  
WILLIAMS GAS PIPELINES CENTRAL, INC.,  
WILLIAMS PIPELINE COMPANY, L.L.C.,  
AND WILLIAMS COMMUNICATIONS,

Appellants.

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SUBSTITUTE REPLY BRIEF OF APPELLANTS

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APPEAL FROM THE CIRCUIT COURT  
OF PLATTE COUNTY, MISSOURI,  
DIVISION I  
CASE NO. 99 CC 0930

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## **ARGUMENT**

Both in its jurisdictional posturing and in its half-hearted arguments on the merits, Respondent's brief is rife with instances of "straw-man arguments," which attack peripheral issues in an obvious attempt to divert this Court's attention from the real issues on appeal. These attempts must fail. Respondent's jurisdictional arguments overlook the basis for this appeal and strain Missouri case law past its reasonable bounds. Appellants seek review of the Circuit Court's failure to follow the procedures set forth in the Missouri levee district statute and from the Circuit Court's violation of their constitutional right to due process and uniform taxation. Both arguments are subject to review under Missouri law and have not been waived in any manner by Appellants.

Respondent's failure to directly dispute Appellants' arguments on the merits relating to the lack of substantive procedures offered by the Circuit Court establishes that reversal is warranted. Respondent's apparent position, that Appellants need not be afforded a meaningful summary proceeding before the taxation of millions of dollars against them (Resp. Br. at 38), is repugnant to due process and makes the provisions of Chapter 245 wholly inconsequential. Respondent's indifference to Appellants' legitimate constitutional and statutory concerns is telling as to the inadequacy of the procedures afforded below. This Court can and should reverse the judgment of the Circuit Court and require it to afford these landowners the right to obtain a meaningful review of the basis for assessing tens of millions of dollars against them.

**I. UNDER ESTABLISHED MISSOURI LAW, THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL.**

**A. Respondent has Failed to Submit Any Case Law or Arguments that Address the Specific Bases for Jurisdiction Advanced by Appellants, Nor has Respondent Refuted the Analogous Contemporary Precedents Cited by Appellants.**

Respondent's jurisdictional arguments misapprehend Appellants' stated basis for appeal and attempt to obfuscate the issue at hand. Missouri law provides that appellate jurisdiction exists under a Chapter 245 benefit assessment proceeding when the landowners either challenge a circuit court's failure to follow the strictly construed statutory procedures for determining benefits, or when they assert that the trial court's procedures violated constitutionally protected rights. In re Tri-County Levee Dist., 42 S.W.3d 779, 782 n.1, 788 (Mo. Ct. App.-E.D. 2001). Respondent's arguments to the contrary mischaracterize the arguments being presented to this Court and its basis for jurisdiction. The nature of Appellants' arguments, not the distortions of those arguments offered by Respondent, dictate that this Court has jurisdiction to hear this appeal.

Respondent spends almost the entirety of its jurisdictional argument recounting the structure of Section 245.130, and setting forth an elaborate discussion of statutory construction relating to the appellate categories it names. This argument misses the mark. Appellants themselves articulated in their opening brief that the legislature obviously intended to streamline the benefit assessment process. (App. Br. at 6). But, Respondent fails



to address the second and crucial aspect of Appellants’ jurisdictional analysis—that “any appellate limitations inferred from Section 245.130.4 presuppose that the circuit court strictly followed the statute and otherwise complied with all constitutional mandates.” Id. As Appellants have consistently argued, it is only if the circuit court follows the strictly construed requirements of Chapter 245 and only if the court’s procedures otherwise comply with the strictures of the constitution, that the legislature’s intention to limit appellate review can be followed.<sup>1</sup> Neither of these preconditions was met below.

Thus, Respondent’s prolonged recitation of the rules of statutory construction is a red herring. The issue is not whether Chapter 245 facially limits appeals. Rather, the issue is whether the Circuit Court’s failure to comply with the strictly construed requirements of Chapter 245 and the demands of due process may be remedied by appellate review in this Court. As set forth in Appellants’ opening brief, Section 512.020 of the Missouri Revised

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<sup>1</sup> Respondent concedes that the Circuit Court was exercising legislatively delegated authority when assessing the benefit/tax against Appellants. (Resp. Br. at 32). In essence, the Circuit Court took the place of the Missouri General Assembly in this endeavor. Yet, Respondent also argues that the Circuit Court’s decisions relating to the assessment of this tax should be insulated from judicial review by this Court. The United States Supreme Court has cautioned against interpreting statutes so as to grant the legislature the power to act without the benefit of judicial review of constitutional claims. Webster v. Doe, 486 U.S. 592, 603 (1988). A contrary interpretation would set a dangerous precedent by removing a crucial check of the legislature’s powers.

Statutes confers such jurisdiction absent clear and convincing evidence that the legislature intended otherwise. (App. Br. 4-7). Respondent fails to address Appellants' arguments that no such evidence exists. Additionally, Respondent fails to discuss, much less distinguish, the cases cited by Appellants that support jurisdiction.

Respondent's bald assertion that Missouri courts have "consistently interpreted" (Resp. Br. at 13) Chapter 245 to exclude examination of benefits assessments is a complete misstatement of Missouri law. For instance, In re Tri-County Levee District, 42 S.W.3d 779 (Mo. Ct. App.-E.D. 2001) (cited by Respondent throughout its brief), contradicts Respondent's assertion by explicitly finding appellate jurisdiction to hear statutory and constitutional claims of error relating to a benefits assessment. Id. at 782 n.1, 788. Indeed, all recent Missouri decisions examining this jurisdictional issue have either implicitly or expressly found that they had jurisdiction to hear such appeals. Id.; In re Mo. Bottoms Levee Dist., 71 S.W.3d 668 (Mo. Ct. App.-E.D. 2002) (ruling on the merits); In re Fabius River Drainage Dist., 35 S.W.3d 473, 474 n.1 (Mo. Ct. App.-E.D. 2001) (holding that despite the absence of express language authorizing benefit assessment appeals within the Missouri drainage statute, the court had jurisdiction to determine whether the circuit court had complied with the strict requirements of the act and whether its procedures comported with the demands of the constitution). Accordingly, despite Respondent's unsupported assertions to the contrary, well-established Missouri precedents dictate that this Court has jurisdiction to hear this appeal.

The authorities relied upon by Respondent are curious at best. For instance, the oft-cited case of Peatman v. Worthington Drainage District, 176 S.W.2d 539 (Mo. Ct. App.-K.C.

1943), actually supports the existence of jurisdiction for this appeal. The Peatman court did note that appeals under drainage district assessments are generally limited to damages. However, the court went on to rule that strict statutory compliance was required in order for any assessment to be valid. Id. at 545. The court ultimately affirmed the trial court's refusal to grant a lien against the landowner's property in favor of the drainage district, finding that the district had failed to follow the strict requirements of the drainage district statute and thus, that the assessment was invalid. Id. at 546. This was a clear ruling on the merits of the appeal. Although this case presents the converse factual scenario to the present case, it conclusively demonstrates that this Court, like the Peatman court, has jurisdiction to hear an appeal of an assessment of benefits if the basis for challenging the assessment is the failure to follow the strict requirements of the statute.

Respondent also relies heavily on certain passages taken from Birmingham Drainage District v. Chicago, Burlington & Quincy Railroad, 202 S.W. 404 (Mo. 1917). This case is distinguishable in several ways. First, the Birmingham court never ruled that it was without jurisdiction to hear the appeal, and discussed the limitations on appeals under Section 242 only in dicta. It dismissed the appeal not for jurisdictional reasons, but because the appellant had failed to provide notice of the appeal to all landowners within the district. Id. at 409. Second, and more importantly, the Birmingham court did not face the same statutory and constitutional compliance bases for jurisdiction faced by this Court. Rather, the court, like Respondent, simply examined the facial structure and general limitations of Section 245.130.4. The Birmingham court (unlike this and the Peatman courts), was not faced with

the issue of whether the failure to meet the preconditions of statutory and/or constitutional compliance can provide a basis for appellate review. Thus, Birmingham is inapposite.

In sum, Respondent has failed to present to this Court any precedent that refutes Appellants' jurisdictional basis. It has also failed to distinguish the clear case law cited by Appellants. Ample precedent establishes that the failure of a circuit court to follow the strictly construed requirements of Chapter 245, or the mandates of the constitution, provides the basis for appellate jurisdiction. Respondent has failed utterly to refute this precedent. This Court has jurisdiction to entertain this appeal and to rule on the merits.

**B. Appellants Raised All Constitutional Issues in a Timely Manner and in Compliance with All Rules of this Court.**

Appellants have raised all issues, including their constitutional basis for jurisdiction, in a timely manner and in compliance with Supreme Court Rules. Respondent's arguments to the contrary omit arguments made before the court of appeals in Appellants' Reply Brief. Respondent's arguments also distort the language and intent of Rule 83.08.

In the opening brief before the Missouri Court of Appeals for the Western District, Appellants relied upon Article V, Section 3 of the Missouri Constitution as a basis for general appellate jurisdiction. At that early stage, Respondent had presented no challenge to appellate jurisdiction. Despite having the opportunity to do so, Respondent did not file a separate motion to dismiss this appeal for lack of subject matter jurisdiction. Instead, Respondent raised its objection to appellate jurisdiction for the first time in Respondent's Brief before the Court of Appeals.

In their Reply Brief, Appellants responded to the Levee District's jurisdictional arguments by setting forth two bases for appellate jurisdiction: (1) the Circuit Court's failure to follow the strictly construed requirements of Chapter 245; and (2) the Circuit Court's violation of Appellants' constitutional rights. (App. Reply Br. before Ct. App. at 4-5). These bases have remained unchanged throughout the course of Appellants' arguments before this Court and the Court of Appeals. In fact, in the Reply Brief before the Court of Appeals, Appellants cited to and discussed the Tri-County, Hillside, Elsberry, Mackin, Fabius, Peatman, Birmingham, and Missouri Bottoms cases, as well as Chapter 245 and Section 512.120 of the Missouri Revised Statutes. Precisely the same authorities were offered to this Court in support of Appellants' jurisdictional claims. While the arguments have been refined through the appellate process, the essential characteristics of Appellants' bases for jurisdiction have remained constant.

Respondent's "authorities" for its waiver argument are off-point. None of the cases cited by Respondent relates to waiver of issues arising in a transfer of a cause from the Court of Appeals to this Court. In fact, all deal with waiver at the trial court level. Moreover, none of Respondent's authorities address an alleged waiver of a constitutional claim for appellate jurisdiction, or jurisdictional issues at all. Respondent has set up another "straw-man" legal argument—specifically, that the legal doctrine of waiver exists in Missouri—but fails to support the application of this concept with cases relevant to the facts at hand.

Respondent further misconstrues Supreme Court Rule 83.08(b), which states that the parties' substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." (emphasis added). Even if Appellants had altered their bases for jurisdiction,

which they have not, this would not violate Rule 83.08(b). Arguments as to jurisdiction are not a “claim.” In the appellate context, the term “claim” envisages a request for relief, from the lower court’s ruling, addressed to the appellate court. See Gisler v. Allen, 693 S.W.2d 201, 204 (Mo. Ct. App.-W.D. 1985) (using the term “claim” synonymously with appellants’ points of error). Arguments as to jurisdiction do not fall into the category of a claim. If this Court had intended Rule 83.08(b) to expand the prohibition against altering claims to include a prohibition against altering the basis for jurisdiction, it could have clearly done so. Since it did not, Rule 83.08(b) is inapplicable.<sup>2</sup>

Thus, Respondent’s reliance on Supreme Court Rule 83.08(b) and other inapplicable authorities is misplaced. Appellants’ constitutional arguments were made in a timely manner.

**C. Appellants are Not Estopped from Challenging the Procedures Below Because They have Withdrawn Preliminary Awards from the Court; Such Withdrawals are Not Waivers of Appellants’ Rights to Challenge a Benefit Assessment and are Wholly Irrelevant to the Issues Presented in this Appeal.**

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<sup>2</sup> The Court likely did so with good cause because oftentimes (although not here), the Supreme Court has a different basis for jurisdiction than the Court of Appeals. See generally Mo. Const. art. V, § 3 (defining the differing jurisdictions of the Supreme Court and the Court of Appeals).

Respondent's next attempt to avoid addressing the merits of this appeal is to argue that Appellants have waived their right to appeal because they have withdrawn their preliminary damage award from the Clerk of the Circuit Court. In making this argument Respondent has ignored the statutory scheme created by the legislature. Respondent has also taken pronouncements made by courts faced with very different legal circumstances out of context in order to support its strained interpretation of Chapter 245.

Chapter 245 establishes benefit and damage assessments as wholly separate matters with distinct procedures. For instance, the statute requires that the commissioners determine the monetary benefit, if any, to each tract of land within the levee district. This benefit assessment forms the basis for a tax imposed upon the landowner which funds construction of the levee. Mo. Rev. Stat. § 245.180. The circuit court is not required to afford landowners a jury trial to challenge the commissioners' benefit assessments and need only provide a summary proceeding prior to confirmation. Id. § 245.130. Upon confirmation of the benefit assessment by the circuit court, the levee district is authorized to levy and collect a tax on the property. Id. § 245.180.

Conversely, the damage assessment attempts to compensate any landowners whose property is condemned or otherwise damaged in order to construct the levee. Id. § 245.145. The statute does not provide for a "set-off" of benefits against damages and classifies each as a separate determination. Landowners are entitled to full jury trials for their damage claims, including all processes due under a general condemnation proceeding. Id. § 245.130. An award of damages which is confirmed by the circuit court allows the court to condemn the property. Id. § 245.145. However, prior to the condemnation, the levee district must pay

into the court the preliminary award assessed by the commissioners. Id. The landowners may later challenge the amount of the award in a jury trial. None of these procedures is available for a benefit assessment.

Respondent attempts to marry these two distinct issues to support its argument that a withdrawal of a preliminary damage award somehow waives any right to appeal the benefits assessment. In other words, Respondent argues that Appellants must elect either to appeal the erroneous benefit determination made by the Commissioners, or to withdraw the funds meant to preliminarily compensate Appellants for land which the Levee District has already taken. This choice is untenable and contrary to Missouri law.

Missouri law provides that a landowner in a condemnation action may withdraw the funds deposited into court for purposes of condemnation without waiving its right to further litigate the issue. State ex rel. Mo. Highway & Transp. Comm'n v. Chadwell, 735 S.W.2d 96, 98 (Mo. Ct. App.-S.D. 1987). As the Chadwell court noted,

[I]t would be patently unfair for a landowner, who is deprived of his property, to not be allowed to withdraw the funds deposited on his behalf simply because he has chosen to exercise his constitutional right to obtain a final adjudication upon the issue of just compensation.

Id. at 99. Thus, Missouri courts have adopted the reasonable position that a landowner should not have to choose between continued litigation and the withdrawal of funds meant to compensate the landowner for land already condemned. Missouri law provides one caveat: the landowner cannot question the validity of the condemnation during the subsequent litigation. This fundamental exception to a condemnor's right of withdrawal is



rooted in the equitable notion that a party should not be able to both question the validity of the condemnation itself, while simultaneously seeking its rewards. Kansas City S. Ry. v. Second St. Improvement Co., 166 S.W. 296, 298 (Mo. 1914). In this appeal, the power of the Levee District to condemn the lands taken for the levee project is not in question. What remains in dispute is the final compensation to be afforded for the condemned property (an issue to be resolved by a jury), and the wholly separate issue of whether the benefit assessments were fairly and accurately allocated (the issue at the heart of this appeal). Accordingly, the cases cited by Respondent are inapposite.<sup>3</sup>

**D. Respondent’s Arguments Concerning “Legislatively Enacted and Prescribed Processes for Appealing Tax Assessments” are Irrelevant to the Issues in this Appeal.**

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<sup>3</sup> The cases cited by Respondent are not levee or drainage district cases. Moreover, the cases merely hold that a condemnee cannot question a condemnor’s ability to condemn once the condemnee withdraws the funds deposited with the court. See, e.g., Jackson County v. Hesterberg, 519 S.W.2d 537, 545 (Mo. 1975). The seemingly sweeping quotations offered by Respondent against challenging “any irregularity” occurring prior to the condemnation are taken out of context. None of the courts making those statements was faced with the unique factual circumstances presented by a levee or drainage district proceeding, in which damage and benefit assessments are determined and litigated concurrently.

Section V of Respondent's brief addresses an issue which Appellants are not even raising in this appeal. Specifically, Respondent argues that the scheme set forth by the legislature in Chapter 245 provides due process and an opportunity to be heard. Appellants do not disagree with this proposition, but the proposition is irrelevant to this appeal. Appellants bring this appeal because the Circuit Court failed to follow the procedures set forth in Chapter 245 and, thus, violated Appellants' due process and statutory rights. In other words, Appellants are not arguing that a summary hearing is inadequate per se, but rather that the "summary proceeding" which Appellants received below was inadequate. Clearly, the legislature was within its bounds when it limited levee district litigants to a summary hearing on all benefit assessments. However, and as argued in Appellants' opening brief, even a summary proceeding must meet certain minimum constitutional and statutory standards. The Circuit Court failed to meet these requirements and, therefore, its Order must be reversed. Respondents' transparent attempt to direct this Court's attention to nonexistent legal disputes should be rejected.

**E. The Timeliness of the Filing of Exceptions by the Seyllers is Not an Issue on Appeal.**

Respondents' arguments relating to the Seyllers cannot be considered by this Court. Respondent improvidently seeks affirmative relief from this Court without having filed a cross-appeal pursuant to Supreme Court Rule 81.04(b). Missouri law does not allow Respondent to request correction of errors below without the benefit of a formal cross-appeal. Int'l Harvester Co. v. Mahacek, 705 S.W.2d 603, 605 (Mo. Ct. App.-E.D. 1986) ("Generally, a respondent, without a cross-appeal, cannot allege errors on appeal, unless he

seeks to support the rulings of the trial court by pointing to other rulings which appear to be erroneous”). Respondent’s attempt to make an end run around this Court’s Rules relating to cross-appeals should be rebuffed.

The Seyllers filed their exceptions on October 3, 2001. (LF 828). At the October 4, 2001 hearing, the Seyllers orally requested that the Circuit Court hear their exceptions. (Tr. I, p. 126). Respondent objected (Tr. I, p. 126) and had the opportunity to argue its position. (Tr. I, p. 136 – 138). The Court found, however, that “substantial property rights are at issue here to be heard” and granted the Seyllers leave to file out of time. (Tr. I, p. 139). Respondent, however, filed no notice of appeal or cross-appeal. Instead, Respondent waited to raise the issue in its Brief before the Court of Appeals, filed on October 9, 2002.

In Missouri, appellate courts may not consider issues that are not properly raised. Fischer v. Brancato, 937 S.W.2d 379, 384 (Mo. Ct. App.-E.D. 1996); St. Louis Concessions, Inc. v. City of St. Louis, 926 S.W.2d 495, 498 n.1 (Mo. Ct. App.-E.D. 1996) (holding that where respondent did not file a notice of appeal or cross-appeal, it failed to preserve any claims of error it may have had against the circuit court’s judgment). Respondent here did not file a notice of appeal or cross-appeal with respect to any issue, including the Circuit Court’s ruling related to the timeliness of the Seyllers’ exceptions. Thus, issues of the Seyllers' timeliness may not be considered by this Court.

**F. Respondent Has Waived or is Otherwise Estopped from Arguing that this Court Lacks Jurisdiction to Hear this Appeal Because Respondent Itself Invoked this Court’s Jurisdiction for the Purpose of Seeking Reversal of**

**the Trial Court's Decision to Allow Wesley and Carol Seyller to File Their  
Exceptions Out of Time.**

Respondent's position on this Court's jurisdiction is disingenuous. Respondent spends sixteen pages in its Jurisdictional Statement and Section I vociferously denying that this Court has jurisdiction to hear this appeal and chastising Appellants for bringing it. In Section VI of its Brief, Respondent nonetheless argues that this Court has jurisdiction to reverse the Circuit Court's decision to allow the Appellants Seyllers to file their exceptions out of time. There is no appreciable distinction between the relief sought by Appellants and the relief sought by Respondent. Both allege error committed by the Circuit Court arising out of the assessment of benefits and both seek reversal of those decisions. Respondent cannot have it both ways, and its argument that this Court has jurisdiction to reverse the trial court's decision waives any jurisdictional argument it may have relating to Appellants' affirmative claims. Bland v. IMCO Recycling, Inc., 67 S.W.3d 673, 678 (Mo. Ct. App.-S.D. 2002) ("[i]f a party affirmatively seeks relief, he necessarily assumes the attitude that the jurisdiction of the court has been acquired.").

At a minimum, Respondent should be estopped from arguing that Appellants' appeal relating to benefits assessments lacks jurisdiction, when in the same breath, Respondent seeks reversal of another decision made by the Circuit Court arising out of this same benefit assessment process. The irony of Respondent's position is palpable. When examining an alleged benefit assessment error committed by the Circuit Court that worked to the disadvantage of the Levee District, Respondent demands strict compliance with "the very clear deadline" set forth in Chapter 245. (Resp. Br. at 54). But, when the Circuit Court

flouted provision after provision of Chapter 245 and otherwise ran roughshod over Appellants' constitutional rights, all to the advantage of the Levee District, Respondent turns a blind eye.

Respondent's incompatible and confused positions relating to jurisdiction should be resolved in favor of appellate jurisdiction to hear those claims of error properly brought before this Court. Respondent has not seriously disputed, nor in some cases even discussed, the numerous errors committed by the Circuit Court. A review on the merits will reveal that reversal is warranted.

**II. RESPONDENT'S CURSORY RESPONSE TO APPELLANTS' CLAIMS ON THE MERITS DEMONSTRATES THAT THE PROCEDURES IMPLEMENTED BY THE CIRCUIT COURT FAILED TO FOLLOW THE REQUIREMENTS OF CHAPTER 245 AND DUE PROCESS, AND REQUIRE REVERSAL.**

Under any definition of the term, Appellants did not receive a "summary proceeding" which complies with the requirements of either Chapter 245 or due process. Appellants will not belabor their arguments presented in their opening brief which set forth in full detail the lack of proper procedures afforded by the trial court. The record is clear on this matter, and Respondent's perfunctory response does not warrant reiteration of these points. Indeed, Respondent's brief is telling for what it does not address. It fails to address Appellants' primary argument: that the Circuit Court was required to provide Appellants with access to the Commissioners' methodology and work as a part of a summary proceeding. Instead of

addressing this focal issue, Respondent attempts to misdirect the Court by pointing to peripheral proceedings which, it claims, satisfied due process and the requirements of the statute. These peripheral proceedings, however, did not provide Appellants with access to the Commissioners' methodology. Nowhere was the basis for their benefit assessment revealed either to Appellants or to the trial court itself.

**A. Respondent's Purported "Strong Foundation" Supporting the Circuit Court's Confirmation of the Commissioners' Benefit Assessment is Nothing More than a House of Cards.**

The record below is utterly devoid of any explanation of how each landowner's share of the \$69,000,000.00 tax assessment was determined or on what basis the Circuit Court found this assessment to be "reasonable." In a meager attempt to fill this gaping hole in the record, Respondent refers to what it terms as a "strong foundation" for the Circuit Court's confirmation. (Resp. Br. at 41). Specifically, Respondent points to: (1) the Commissioners' oath; (2) the Commissioners' Report; (3) the Coulson Affidavit; (4) the June 30, 1999 hearing; and (5) "other [undisclosed] documents relied upon by the Trial Court." (Resp. Br. at 41, 48). Respondent argues that these portions of the record lay the "strong foundation" for the Circuit Court's confirmation. A closer examination of this foundation, however, reveals more cracks than mortar.

Respondent first attempts to fill the holes in the Circuit Court's record below by emphasizing that the Commissioners took an oath of office which indicated that they would fulfill their duties. (Resp. Br. at 41-43). Respondent's apparent logic is that because the Commissioners took an oath they must have done their jobs correctly, and the Circuit Court

was justified in affirming their Report without either discerning for itself or providing the landowners with an inkling of how the Commissioners had developed their tax assessments. This argument is similar to the “trust the Commissioners, they are good people” argument made by the Levee District below. (Tr. II, pp. 166-67). With all due respect to the Commissioners, their credentials, and the oath that they took, Appellants are not obliged simply to trust the Commissioners to assess millions of dollars in taxes without any explanation of the basis for their assessments. Even the most honorable persons can make mathematical errors, judgment errors, miscalculations of acreage, inaccurate flood plain determinations, or other simple oversights.<sup>4</sup> Appellants had an absolute right to review the

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<sup>4</sup> The reality of mistakes in the Commissioners’ Report is starkly illustrated in the record. The Commissioners’ original report was amended by the Circuit Court because of “several typographical errors.” (LF 1125). These scrivener’s mistakes, apparently made when transposing the final assessment and damage calculations into the Report, were discovered and corrected by the Commissioners. (LF 853-57, 1125). As demonstrated by the infamous Coulson Affidavit, the Commissioners made numerous calculations, judgments, and categorizations for each of the hundreds of landowners in the District when calculating the final benefit figures. (LF at 1118-19). Any mistakes made by the Commissioners in applying their formula to each tract of land would not be discernible on the face of the Report, which presents only the final numbers.

Even more disturbing are the implications of these potentially hidden mistakes. The formula apparently employed by the Commissioners sought to assign a percentage of

Commissioners' work and present informed exceptions to the Report prior to any confirmation by the Circuit Court.

Respondent next argues that the Commissioners' Report provided a brick in the "strong foundation" of the Circuit Court's confirmation. (Resp. Br. at 41). The Report speaks for itself. It is a mere summary finding that provides no details as to the Commissioners' methodology. This perfunctory document provides no basis for the Circuit Court's determination that the allocation of benefits was reasonable.

Respondent next lays the infamous Coulson Affidavit as a foundational brick supporting confirmation (Resp. Br. at 41), but ignores the most important characteristics of this unreliable cornerstone: the affidavit is incomplete, and does not state how the Commissioners applied their formula to each unique parcel of land; the Levee District offered the affidavit after the landowners had submitted their exceptions; the affidavit represented the uncrossed testimony of the central witness in this case; and it was relied upon by the Circuit Court when confirming the Order without the landowners even being afforded an opportunity to respond to its contents. (App. Br. at 35-36, 39-43). Respondent's

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assessment for each landowner. (LF 1118-19). Thus, if one added all of the landowners' percentages, it would equal 100 percent. (Tr. II, pp. 183-84). If the Commissioners made even one error in the assessment of benefits of one landowner which resulted in a percentage under-assessment of that landowner, then that would mean that all of the other landowners were over-assessed to make up for the shortfall. Again, Appellants have a right to examine the Commissioners' calculations to ensure that the work was done accurately.



deliberate omission of the Circuit Court's unfair use of this incomplete affidavit, while understandable, evinces Respondent's strategy of pointing out selected portions of the record without providing this Court with a full picture of the proceedings below. Moreover, the Coulson Affidavit is typical of the unfair and one-sided treatment experienced by the Appellants in the proceedings below.

Respondent next attempts to bolster the Circuit Court's deficient record by citing to the June 30, 1999 hearing in which Ann Daniels and John Stacy testified as to the overall benefit provided by the levee to the land within the Levee District. (Resp. Br. at 43-46). This argument again misses the point of this appeal. This appeal does not question the determination of the Circuit Court that the levee project as a whole was viable, nor does it challenge any of the proceedings prior to the appointment of the Commissioners. Rather, this appeal raises issues related to the work performed by the Commissioners in allocating the benefit/tax assessment, and the Circuit Court's failure to permit Appellants to have access to this work. Allocation of benefits was not a topic at the June 1999 hearing cited by Respondent and indeed, the Commissioners assigned to make this allocation were not even appointed until June 22, 2000. (LF 666-70). The June 30, 1999 hearing is being offered by Respondent to make it appear as though Appellants were offered an opportunity to contest the Commissioners' findings, when in fact, no such opportunity was ever afforded them.<sup>5</sup>

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<sup>5</sup> Appellants do not dispute that the Circuit Court could have considered the June 30, 1999 hearing in making its determination that the levee project's benefits outweigh its costs. Again, this issue is not the subject of this appeal. Appellants appeal the Circuit Court's total

Finally, Respondent suggests that the Circuit Court's confirmation of the Commissioners' Report was supported by "other documents relied upon by the Trial Court." (Resp. Br. at 48). Respondent does not specify what these "other documents" are. Appellants have scoured the record to find these mystical "other documents" that might possibly have provided the Circuit Court with some basis for determining how the Commissioners allocated the benefits and that this allocation was "reasonable." None were found. Again, the house of cards may be peddled as sturdy by the Respondent, but a closer inspection reveals instead the rickety foundation upon which the Circuit Court based its decision.

**B. Respondent also Overstates the Opportunities that Appellants had to Present their Exceptions to the Court, and Wholly Ignores the Standard by the Which the Circuit Court Reviewed the Commissioners' Report.**

Respondent also points out that the Appellants were given the opportunity to submit exceptions, make oral arguments, and later submit supplemental exceptions. Respondent apparently hopes that the mere appearance of procedures by the Circuit Court will somehow convince this Court that Appellants were afforded due process and necessary statutory rights. However, the processes offered by the Circuit Court rang hollow.

What Respondent again ignores is that despite the hearings and written exceptions allowed by the Circuit Court, Appellants at all times lacked any knowledge as to what work

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lack of foundation for confirming the Commissioners' allocation of those costs amongst the landowners. To this central issue before this Court, the June 30, 1999 hearing is irrelevant.

the Commissioners had performed. In spite of repeated requests from Appellants, the Respondent objected to, and the Circuit Court refused to allow, any access to the work performed by the Commissioners. (Tr. II, pp. 179, 190) (LF 1178). The Appellants were simply told to file their exceptions to the Commissioners' Report based on the bare figures offered in the Report.<sup>6</sup> Respondent criticizes Appellants for their failure "to challenge the exact numbers provided in black and white in such Report." (Resp. Br. at 48). As discussed

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<sup>6</sup> The Circuit Court's instructions on this point were also unclear. The October 4, 2001 hearing was marked with confusion. The Circuit Court offered no clear directions to the parties concerning the all-important issues of the form of the summary proceeding (would it be a trial, hearing, written motions, etc.), discovery, witnesses, and access to the Commissioners' methodology. (Tr. I, p. 1-146). Rather, the Circuit Court simply offered the parties a ten-day window to brief these procedural issues. (Tr. I, p. 139). Nowhere during the October 4, 2001 hearing, nor at any other time, did the Court indicate that this supplemental briefing would be the parties' only opportunity to present their cases to the Court.

In fact, to this day Appellants are not certain when the Circuit Court and Respondent believe that the summary proceeding occurred. Was it the October 4th hearing wherein the parties were not allowed to present witnesses and the Court offered no directions as to the scope of the proceedings? Or was it the suggestions filed ten days later in which the landowners were apparently expected to submit their entire case in opposition to the Commissioners' findings despite lacking any knowledge as to the Commissioners' work?

below, such evidence was offered, but was of little import. Respondent conveniently ignores the standard by which the Circuit Court was required to review and confirm the findings of the Commissioners. The alleged opportunities to contradict the findings of the Commissioners that were offered by the Circuit Court were meaningless because the Appellants could not even hope to meet the standard for challenging the assessment without access to the Commissioners' work.

A circuit court must confirm the commissioners' assessment of benefits if their assessment "has a rational basis and is not arbitrary, unreasonable, or capricious." In re Tri-County Levee Dist., 42 S.W.3d 779, 788 (Mo. Ct. App.-E.D. 2001). Respondent concedes this standard. (Resp. Br. at 42). Logically, in order to prove that the commissioners' basis for an assessment was not rational, the landowners must be able to know the basis for the assessment. To this day, the Commissioners' full methodology and work has not been given to Appellants, or, for that matter, to the Circuit Court charged with evaluating its reasonableness. Moreover, despite Respondent's insinuations to the contrary, several of the Appellants filed affidavits and other evidence suggesting that the Commissioners' findings were inflated. (LF 868-883, 892-1055, 1083-1084, 1086-1087). While this presentation provided persuasive evidence that the Commissioners' findings were overstated, Appellants, with this evidence alone, could not meet the standard for showing that the findings were arbitrary and capricious. Simply offering evidence contrary to the findings of the Commissioners does not prove that the Commissioners' findings were irrational, arbitrary and capricious. To prove that the Commissioners' findings lacked a rational basis, Appellants needed to know what the Commissioners had considered, what work they had

performed, and what methodology they had employed. Appellants continue to lack this basic information essential to filing informed exceptions. Thus, the Circuit Court failed to take the necessary procedural steps to ensure that the Appellants were offered a full and fair summary proceeding as that term is understood under Missouri law.

The Circuit Court's alleged summary proceeding below failed to follow Chapter 245 or provide due process because Appellants were given no access to the Commissioners' methodology or work. Respondent cannot dispute this fact because it pervades the record. Perhaps the Commissioners drew straws to assist them in allocating benefits, or perhaps they chose a fair mathematical formula and implemented it without committing one error. Only the Commissioners know. Without access to the Commissioners' work, Appellants were left with no means to show that the Commissioners' findings lacked a rational basis. Thus, Appellants were not provided with a meaningful summary proceeding as required by Chapter 245.

**C. Respondent Mistakenly Believes that the Summary Proceeding that is Afforded to Landowners in a Levee District Case Need Not be Meaningful.**

On page 38 of its Brief, Respondent reveals the attitude that has poisoned this case, and illustrates why reversal is warranted. Respondent actually challenges the notion that the summary proceeding needs to be meaningful. The cornerstone of due process is that any proceeding required by law offer a meaningful opportunity to be heard. Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (noting that for more than a century the central meaning of procedural due process required "an opportunity to be heard . . . at a meaningful time and in

a meaningful manner”) (internal citations omitted); Dabin v. Dir. of Revenue, 9 S.W.3d 610, 615 (Mo. 2000) (same) (citing Mathews v. Eldridge, 424 U.S. 319 (1976)). Accordingly, a “meaningful hearing” is not, as Respondent suggests, some pejorative phrase “conjured up” by Appellants. Rather, it is the foundation of the entire concept of due process.

Respondent rejects this bedrock principle and suggests that a “speedy and unceremonious proceeding,” derived from dictionary definitions, should replace the strictures of the constitutions of this state and this nation. (Resp. Br. at 40). This interpretation of Chapter 245 is ill-advised. Respondent’s proposed “taxation without explanation” is the antithesis to due process.

If one accepts the premise that a meaningful Chapter 245 summary proceeding is constitutionally mandated, then reversal is the only logical outcome. The procedures below lacked any indicia of meaning. Appellants do not request a “jury trial or extended discovery” as Respondent suggests. Instead, Appellants submit that any meaningful Chapter 245 summary proceeding must necessarily include access to the work performed by the Commissioners and some meaningful forum at which Appellants can submit informed objections to the Commissioners’ findings to the Circuit Court. These rudimentary safeguards are the minimum protections necessary to ensure that the demands of Chapter 245 and due process are met. They were not afforded below, and reversal is warranted.

## **CONCLUSION**

The Appellants seek a remand to the Circuit Court with instructions that the Court provide the landowners with a meaningful opportunity to file Exceptions to the Commissioners' Report and to have those Exceptions determined via a summary proceeding. More specifically, the Appellants request this Court to instruct the Trial Court to permit Appellants to obtain discovery regarding the Commissioners' activities, deliberations, and methodology. After receiving such information Appellants request that they be allowed to present their Exceptions to the Commissioners' Report at a meaningful summary proceeding which comports with due process. At a minimum, due process requires a hearing/bench trial where Appellants can present limited live testimony and other evidence, as well as examine the Commissioners and relevant Levee District officials.

Respectfully submitted,

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## **CERTIFICATE**

I hereby certify that the foregoing brief contains 6,864 words and therefore complies with the limitations contained in Rule 84.06(b). Pursuant to Rule 84.06(g), the diskette provided to the Court with the original of this brief has been scanned and determined to be virus-free. I further certify that one copy of Appellants' Brief plus one copy on diskette were duly mailed, postage prepaid, this 19<sup>th</sup> day of August, 2003, to each of the following:

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